

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 26, 1999, Session

STATE OF TENNESSEE v. BOBBY G. GODSEY

**Direct Appeal from the Criminal Court for Sullivan County
No. S38648 R. Jerry Beck, Judge**

**No. E1997-00207-CCA-R3-DD
September 18, 2000**

The defendant, Bobby G. Godsey, was convicted of first degree murder during the perpetration of aggravated child abuse. The jury imposed a death sentence based upon a single aggravating circumstance: "(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older[.]" Tenn. Code Ann. § 39-13-204(i)(1). The defendant was also convicted of aggravated child abuse. The trial court imposed a consecutive sentence of twenty-five (25) years.

Because the legislative enactment precludes a separate punishment for aggravated child abuse where the defendant is also convicted of felony murder, the aggravated child abuse conviction and sentence must be set aside. The felony murder conviction is affirmed. In our view, the 1995 amendment to the death penalty statute and the aggravating circumstance relating to age meet constitutional requirements. Moreover, the evidence supports the application of the aggravating circumstance found by the jury, see Tenn. Code Ann. § 39-13-206(c)(1)(A), and there were no prejudicial errors during the course of the trial. The sentence of death, however, is disproportionate, considering the nature of this defendant and his crime and the defendants and their crimes in similar cases. Thus, the sentence is modified to life without the possibility of parole.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed in Part, Modified in Part, and Reversed in Part.

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Stephen M. Wallace, District Public Defender, Blountville, Tennessee, and James T. Bowman, Johnson City, Tennessee, for the appellant, Bobby G. Godsey.

John Knox Walkup, Attorney General & Reporter, Michael E. Moore, Solicitor General, Alice B. Lustre, Assistant Attorney General, H. Greeley Wells, District Attorney General, and Barry Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In this direct appeal, the defendant, convicted of aggravated child abuse and first degree murder in the perpetration of aggravated child abuse, and sentenced to death by electrocution, has presented the following issues for our review:

(I) whether the trial court erred by failing to dismiss the murder charge on the ground that the 1995 amendment to the death penalty statute, which added aggravated child abuse to the enumerated felonies which may support a felony murder conviction, violates due process and the restrictions against cruel and unusual punishment as provided in the Tennessee and United States Constitutions;

(II) whether the trial court erred by failing to set aside the state's notice of intent to seek the death penalty on the ground that the use of Tenn. Code Ann. § 39-13-204(i)(1) as the sole aggravator in an aggravated child abuse felony murder prosecution does not sufficiently narrow the class of death eligible defendants and renders the punishment of death disproportionate under the Tennessee and United States Constitutions;

(III) whether the sentence of death is excessive under Tenn. Code Ann. § 39-13-206(c)(1)(D), the Constitutions of the United States and Tennessee, and the Criminal Sentencing Reform Act of 1989;

(IV) whether the trial court erred by allowing a separate conviction and sentence for aggravated child abuse;

(V) whether the evidence is sufficient to establish beyond a reasonable doubt that the defendant intended the killing;

(VI) whether the trial court erred by failing to suppress the statements made by the defendant to police;

(VII) whether the trial court erred by allowing certain opinion evidence;

(VIII) whether the trial court erred in the selection and instruction of the jury;

(IX) whether the prosecutor improperly commented upon the defendant's failure to testify; and

(X) whether the trial court erred by failing to arrest the judgment or otherwise dismiss the charge.

The conviction for felony murder is affirmed. For the reasons hereinafter set out, the sentence must be modified to life without the possibility of parole. The conviction for aggravated child abuse is reversed and dismissed.

At 7:21 P.M. on January 1, 1996, the male victim, seven-month-old Evan Price, was driven to the Holston Valley Memorial Hospital by his mother, Robin Marshall. He was not breathing and was suffering from cardiac arrest. Efforts at resuscitation were successful and an endotracheal tube was placed into the victim's airway. An x-ray revealed fractures to the skull and to an arm. The victim was then transported to Johnson City Medical Center for more specialized continuing care. Ultimately, the victim suffered multi-organ system failure. Physicians determined that he was brain dead and life support was withdrawn.

An autopsy revealed that the victim had suffered a severe blow to the head. There was extensive swelling of the brain, referred to as cerebral edema, which led to the victim's death. "Child abuse, non-accidental trauma" was listed as the cause of death.

Darla Faye Anderson, a detective in the Kingsport Police Department, initiated an investigation on the day following the victim's admission to the hospital. Detective Anderson first spoke with the defendant at the Johnson City Medical Center. Later, the defendant made a written statement. He told Detective Anderson that for approximately five months, he had lived in Kingsport with Ms. Marshall, the victim, and Ms. Marshall's two other children. He stated that he provided care for the three children every evening from 8:00 or 9:00 P.M. until approximately 10:45 or 11:00 P.M., when Ms. Marshall returned from work. He related that on the night the victim was hospitalized, he returned to his residence at approximately 4:30 P.M. and completed a shower within sixty to seventy minutes thereafter, at which time he heard the victim whimper. The defendant claimed that he first lifted the victim to his shoulder, brought him to his mother's bed, and then began patting his "butt," noticing nothing unusual about his condition. After Ms. Marshall came to the bedroom to say that she intended to give a friend a ride home, the victim, according to the defendant, was placed back into his crib. The defendant stated that when Ms. Marshall returned within two or three minutes, the victim was asleep and the two decided to watch a movie. He explained that at about 7:15 P.M., while Ms. Marshall was beginning preparations for supper, he walked upstairs to wake the victim. The defendant told Detective Anderson that when he removed the victim from his crib, the victim lay motionless and was not breathing. The defendant claimed that he attempted to resuscitate the victim by breathing into his mouth and that he called for Ms. Marshall and directed her to telephone 911. He remembered that Ms. Marshall then took the victim and drove to nearby Holston Valley Memorial Hospital. The defendant explained that he did not accompany Ms. Marshall because he was not dressed at the time. He did, however, call the 911 operator himself before getting dressed and traveling to the hospital separately.

At trial, Detective Anderson testified that she received a statement from Ms. Marshall at the hospital and then traveled to the crime scene. The defendant led Detective Anderson to the victim's bedroom where she photographed a toddler bed and a crib that were in the room. According to the detective, the toddler bed railing appeared to be approximately six inches from the floor; the crib, appeared to be approximately two feet from the bed. Detective Anderson found toys scattered inside the crib and stains on the sheet. She gathered for analysis the sheet, a blanket from the crib, and a gray tee shirt which belonged to the defendant. The defendant explained to Detective Anderson that the victim had been teething and that the blood on his tee shirt had come from the victim's mouth.

Detective Anderson described the defendant as cooperative at the time she examined the apartment. She stated that the defendant freely provided information about his tee shirt and the other items she had taken from the scene. Detective Anderson testified that she did not see any blood on either the floor or the wall of the victim's bedroom. She introduced as evidence a photograph of the inside of Ms. Marshall's vehicle which showed vomit on the front passenger's seat.

Deane Johnson, former forensic serologist for the Tennessee Bureau of Investigation (TBI), examined the defendant's tee shirt and the sheet and blanket that had been taken from the crib. At trial, she testified that human blood stains were on each of the items.

Mike Martin, supervisor of the serology section of the TBI Crime Laboratory, examined the defendant's tee shirt, the crib sheet and blanket, and a blood sample of the victim. Constance Howard, a TBI forensic scientist specializing in DNA analysis, testified that the blood stains on the tee shirt matched the DNA profile of the victim's blood. Ms. Howard described the odds that the blood on the tee shirt came from a source other than the victim as one in 45.8 million.

Lieutenant Ed Swayze questioned the defendant at the Kingsport Police Department on the day following the victim's admission to the hospital. After being advised of his constitutional rights, the defendant signed a waiver and initially denied knowing anything about how the injuries to the victim might have occurred. The defendant did concede that the manner in which he placed the victim on the toddler bed while attempting to resuscitate him might have caused the fracture to the arm. He also suggested that the victim might have hit his head on the exposed area of the bed rail.

Lieutenant Swayze, who was accompanied in the interrogation by Sergeant Mike Cutshaw, testified that after the defendant was advised that Ms. Marshall had not heard any noise when the defendant had gone to retrieve the victim, the defendant stated that the victim's injuries occurred earlier in the evening when he had attempted to lift the victim and the victim had fallen to the floor. When Lieutenant Swayze said that a fall from that distance could not cause a skull fracture, however, the defendant explained that he had been swinging the victim around and that the victim may have hit his head on the metal bed rail. When asked about the injury to the arm, the defendant answered that he had been swinging the victim by his ankles to keep him from crying and that the victim may have hit both his head and his arm on the floor. According to Lieutenant Swayze, the defendant at that point announced that he was prepared to tell the truth. He first revealed that he was irritable when he returned from work because he had been trying to quit smoking. He confessed that he had

become agitated at the victim's crying and had grabbed the victim by the arm. He stated that the victim's arm became caught on the crib and that he grabbed the victim by the leg and arm and threw him toward the toddler bed. The defendant told officers that the victim landed on the floor, slid under the bed, and hit the wall. He contended, however, that the victim, who was still crying, was breathing when he was placed into his crib.

After a break in Lieutenant Swayze's interview, the defendant made a final statement in writing. In that document, the defendant contended that he was agitated when he returned from work because he was trying to quit smoking; that he put the victim to bed in his crib and left to take a shower; and that when he finished his shower, he took the victim from the crib to Ms. Marshall's bedroom to play. The defendant stated that when Ms. Marshall came upstairs to say she intended to drive her friend home, he placed the victim on his stomach and began to pat his rear. The defendant stated that the victim started to cry as he was returned to his crib. He admitted that he became angry when the victim would not stop crying. The defendant related that he took the victim in both arms and squeezed the victim's head between his biceps and forearm until the crying ceased. The defendant stated that the victim was breathing short breaths when he was left in the crib, but seemed to be all right. The defendant explained that after watching part of the movie, he returned to check on the victim at approximately 7:15. He then discovered that the victim was not breathing. The defendant initiated CPR and directed Ms. Marshall to call 911. Ms. Marshall decided to leave for the hospital with the victim before completing the call. At trial, Lieutenant Swayze estimated that the defendant had given as many as nine different accounts of what had transpired during the three-and-one-half hour interview. Sergeant Cutshaw corroborated Lieutenant Swayze's testimony.

Dr. Bickley Craven treated the victim at the Holston Valley Hospital. Within seven minutes after his arrival, the victim was resuscitated. An endotracheal tube facilitated artificial ventilation. Dr. Craven testified that she observed bruises on the victim's jaw, forehead, and ear and discovered signs of a skull fracture. She described the fracture to the victim's arm as twist-type.

Dr. Craven suggested the transfer to the Johnson City Medical Center for more testing in regard to the skull fracture. Dr. Craven stated that she could not recall any claim that the victim was teething but did remember that Ms. Marshall indicated that there was blood on the defendant's tee shirt. When shown the sheet from the crib, Dr. Craven asserted that it would be "very unusual" for that amount of blood to have been the result of teething.

Dr. Craven reviewed the medical records of the victim and noted that he had been treated with an antibiotic for sinusitis some twelve days earlier. She testified that the medical records of the Family Practice Center, where the victim had been treated since birth, gave no indication of broken bones, burn scars, black eyes, swollen lips, bite marks, lacerations, abdominal trauma, broken fingers, or rib injuries. Emergency room records on the night of the victim's hospitalization indicated "unwitnessed cardiopulmonary arrest, found by mother in bed." There was no external bleeding.

Dr. Craven conceded that during her treatment, one of the victim's lungs had collapsed because the endotracheal tube had been misplaced initially. She stated that there was vomit, which

could have caused choking and cardiac arrest, on the face of the victim. She stated that blood gas test results indicated that the ventilation procedure was successful even though the breathing tube had been misplaced. Dr. Craven also stated that a cerebral edema could cause vomiting and that a one-and-one-half hour delay in treatment could be critical in the event of a cerebral edema.

Dr. Glynda Ramsey, a radiologist, reviewed the x-rays and CAT scans taken of the victim upon his arrival at the Johnson City Medical Center. At trial, Dr. Ramsey testified that the victim had suffered three skull fractures and moderate to severe swelling of the brain. An x-ray indicated a fracture of the right arm at the elbow. Dr. Ramsey related that the victim did not have a sufficient amount of air in his lungs and that there was more gas in the bowel than normal. In her opinion, the victim's injury was too severe to have occurred from a mere dropping of the victim from the height of an adult. Dr. Ramsey stated that the three skull fractures were consistent with the severity of the cerebral edema which would, in turn, result in vomiting and the failure of vital organs. She described the arm fracture as a transverse fracture with some twisting or spiral components and stated that there was no displacement in the skull fractures.

Dr. Rick Thomas Mohon, a pediatric physician at the Johnson City Medical Center, testified that the victim was comatose at the time of his arrival but was breathing with the assistance of an endotracheal tube. Dr. Mohon testified that the victim had lower than normal blood pressure, a faster than normal heartbeat, and facial bruising. He testified that the victim showed no signs of life function. He described the cerebral edema as having been caused by non-accidental trauma, observing that one would have to use all of his or her strength to cause the injuries he had diagnosed.

Dr. Mohon stated that the victim went into cardiac arrest shortly after arriving at Johnson City Medical Center but was resuscitated a second time. He stated that the victim was treated with plasma, blood pressure stabilization medication, oxygen distribution medication, and fluids to help produce urine. Dr. Mohon testified that the victim's organs began to fail and that by 6:25 P.M. on January 2, 1996, approximately twenty-three hours after the initial hospitalization, the victim was declared brain dead and life support was withdrawn.

Dr. Mohon answered a number of hypothetical questions in regard to the several explanations made by the defendant as to the injuries suffered by the victim. In his opinion, none of the initial explanations provided by the defendant could have caused injuries as severe as those received by the victim. He did, however, testify that the injuries were consistent with the explanation that the defendant had grabbed the victim by the arm and leg, tangled the victim's arm in the crib, and thrown the victim such that he struck the floor and slid under the bed and against the wall.

On cross-examination, Dr. Mohon conceded that if an endotracheal tube had been mistakenly inserted too far into one lung, the victim might have become hypoxemic or suffered from low oxygen, which could cause swelling of the brain. Dr. Mohon testified that the retinal hemorrhaging of the victim was an indication of non-accidental trauma. He stated that while cerebral edema can cause vomiting and choking, most seven-month-old children would have mechanisms to protect their airways unless their mental status was severely depressed by cerebral edema.

Dr. William McCormick, Deputy Chief Medical Examiner for the state, conducted an autopsy on the day following the victim's death. Dr. McCormick confirmed that there was a fracture to the end of the right humerus and a laceration of the intervertebral disk between the twelfth thoracic and first lumbar vertebrae. He found skull fractures and severe swelling of the brain. He discovered that the impairment of oxygen to the brain had caused irreparable damage to neurons, critical components of brain function. Dr. McCormick also discovered hypostatic pneumonia, which occurs when the brain is so damaged that it no longer produces coughing or the clearing of secretions. Dr. McCormick determined that the death of the neurons in the brain had been caused by a severe blow to the head resulting in cerebral edema. He described the death as a homicide.

Dr. McCormick testified that there was an absence of older injuries indicative of prior abuse and conceded that the victim did not exhibit severe external bruising, intra cranial hemorrhaging, intestinal bruising, a rupture of the discus, stomach, or spleen, a liver fracture, or a renal fracture. He admitted that he could not exclude the possibility that the injuries were inflicted through reckless or grossly negligent behavior.

Robin Michelle Marshall testified for the defense. She stated that the defendant had resided with her, the victim, and her two other children, ages five and four. She contended that the defendant, who usually had exclusive care of her children between 8:00 or 9:00 P.M. and 10:30 P.M. each night, had a good relationship with the victim and her two other children. She testified that the victim suffered frequent respiratory infections, and at the time of his hospitalization, had been cutting teeth, which caused his gums to bleed. She claimed that some of the stains on the defendant's tee shirt came from the bleeding gums, but she could not identify the stains on the sheet found in the crib. Ms. Marshall testified that there were vomit stains on the blanket found in the crib and confirmed that the toddler bed was made of metal. She testified that the victim, who was learning to walk, often fell and had several bruises from the falls. She asserted that the defendant had never struck the victim or been "mean to him."

Ms. Marshall testified that the defendant worked on January 1, 1996, and that her other two children were visiting her mother. She recalled that the defendant arrived at the apartment at 6:00 or 6:30 P.M. and played with the victim for a while before she placed the victim in his crib and drove her friend home. Upon her return a few minutes later, Ms. Marshall discovered the defendant and the victim in her bedroom. She remembered that the defendant had offered to place the victim in his crib as she went downstairs to prepare supper. Soon afterwards, the defendant came downstairs and they watched a home video for approximately an hour before deciding that the victim should be awakened. She said that the defendant discovered the victim's condition and directed her to call 911. She claimed that while she did call 911, she did not wait on the operator because she realized that she could get the victim to Holston Valley Memorial Hospital faster than an ambulance could get to her residence. She remembered that while she was calling 911, the defendant attempted CPR on the victim. Ms. Marshall testified that there was vomit on the victim and on the seat of her car. She stayed with the victim continuously until his death the next day.

On cross-examination, Ms. Marshall testified that she had married the defendant approximately two months after the death of the victim. She also revealed that she had filed for an annulment in April of 1997, a little over a year after their marriage.¹ She claimed that she had never seen the blood stains on the sheet or the vomit stain on the blanket found in the crib. She conceded that she did not know what happened to the child when she left the apartment to take her friend home on the day the victim was taken to the hospital. Ms. Marshall acknowledged that the toddler bed was a hollow tube frame with thin metal that could be lifted with one hand.

Daniel Christian roomed with the defendant for seven or eight months in 1995 and had worked with him as a landscaper and a commercial painter. Christian testified that he visited the defendant at least twice a week after the defendant moved into Ms. Marshall's residence. He testified that the defendant had served in a "fatherly role" to the victim. Christian recalled that the defendant had turned down his invitation to attend a Citrus Bowl football game in Florida so that he could spend the holidays with Ms. Marshall and her children.

Silas Jenkins, owner of New World Paint Services, testified that the defendant, who had been an employee of his business, was an excellent worker. Jenkins recalled having seen the defendant with the victim on two occasions during which the defendant had provided good care for the victim and had expressed concern for his health.

Christy Christian, a neighbor, testified that she often visited the apartment occupied by the defendant, Ms. Marshall, and Ms. Marshall's children. Ms. Christian stated that the defendant had always been good with the children, that he had provided for them, and that he had had an especially good relationship with the victim, whom he treated as his own child. Ms. Christian, who was visiting in the residence just before the victim suffered his injuries, overheard the defendant playing with the victim upstairs just before she left with Ms. Marshall. Ms. Christian testified that she had left her daughter at Ms. Marshall's residence that evening. When Ms. Christian called the residence an hour later to check on her daughter, the defendant explained that the victim was at the hospital and that Ms. Christian's daughter was being cared for by Ms. Marshall's mother.

Vickie Robinson, a friend of the defendant, testified that the defendant had expressed satisfaction with his relationship with Ms. Marshall and her three children. She recalled that she had seen the defendant prior to the hospitalization of the victim and that the defendant had stated that he was working, that he was staying out of trouble, and that his life was going well.

Scotty Trivett, who was at the Holston Valley Hospital on the night the victim was admitted, testified that he observed Ms. Marshall arrive at the hospital screaming, "Help me, help me, my baby." Trivett testified that Ms. Marshall reached into her car, grabbed the victim, and ran toward the front door of the hospital. He stated that she jerked the hospital door open, and that the door appeared to strike the victim on the middle of his head or on the forehead. Trivett testified that the defendant, who arrived at the hospital about thirty minutes later, was hugging Ms. Marshall and

¹The defendant had been in jail awaiting trial during that entire period.

crying with her. He described both the defendant and Ms. Marshall as very upset. Trivett testified that when he learned later, while watching television, that the defendant had been charged with the crime, he contacted the Jonesborough Police Department to report what he had seen about the hospital door. On cross-examination, Trivett reiterated that he had seen the hospital door strike the victim in the forehead, but also acknowledged that the victim appeared to be dead at the time he was taken from Ms. Marshall's car.

Ruby Metros, an oncology social worker at the Johnson City Medical Center, testified that she had observed the defendant and Ms. Marshall throughout the day following the hospitalization of the victim. She stated that at times they appeared to be relatively calm and that at other times they appeared to be very upset. Ms. Metros was present when the defendant and Ms. Marshall were told that life support would be disconnected. She recalled that the defendant and Ms. Marshall were very emotional when placed in the room with the victim to say their goodbyes.

The 911 audiotape indicated that the defendant had initially called for an ambulance, stating that the victim had stopped breathing. The tape indicated that the defendant then informed the dispatcher that Ms. Marshall was on her way to Holston Valley Hospital with the victim.

Dr. Geoffrey Boercker, a physician specializing in the field of trauma medication, testified for the defense. After reviewing the relevant medical facts and circumstances pertaining to the victim, Dr. Boercker concluded that the majority of the brain injuries suffered by the victim were due to heart stoppage. He stated that the fracture of the arm probably occurred either simultaneously with or just following the cardiac arrest. It was his opinion that the impact which caused the victim's skull to fracture also caused the bilateral retinal hemorrhages.

Dr. Boercker testified that the misplacement of the endotracheal tube lessened to some degree what little chance the victim may have had for survival. Dr. Boercker testified at length as to the various classes of injuries associated with an abused child and noted an absence of any of the classic signs in this victim. Dr. Boercker, who noted that the victim had, in fact, been teething at the time of his death, testified that he did not agree that it could be determined within a reasonable degree of medical certainty that the victim had died of "traumatic brain injury, child abuse/non-accidental trauma." He identified heart stoppage as the cause of death and testified that while the victim's injuries were consistent with child abuse, they could have occurred in other ways. On cross-examination, Dr. Boercker expressed the view that retinal hemorrhages could be caused by a "moderate" force, more than falling off a two-foot-high bed.

In rebuttal, Dr. William McComick refuted Dr. Boercker's claim that the victim's spinal injury and broken arm occurred simultaneously with cardiac arrest. He stated that, in his opinion, the death of the victim could not have been caused by acute respiratory embarrassment² due to aspirations with laryngospasm and secondary cardiac arrest, because the regurgitation produced by

²"[T]o impede the function of; to obstruct." The Sloane-Dorland Annotated Medical-Legal Dictionary 244 (1987).

the victim was small in amount. He testified that the injuries could have been the result of either reckless or intentional conduct.

After the defendant was found guilty of first degree murder and aggravated child abuse, the state declined to present further evidence in the penalty phase of the trial. Dr. Larry Miller, professor of criminal justice and criminology at East Tennessee State University, testified for the defense as an expert in the areas of criminology and mitigation. Dr. Miller, who had investigated the defendant by interviewing the defendant's family, friends, and former employers and by examining the defendant's medical records, school records, and criminal records, testified that the defendant's family had moved ten times by the time that the defendant was seventeen years of age. Dr. Miller stated that the defendant had hidden in a closet at the age of four when the family's trailer caught on fire and that his father had re-entered the fire to save him. He learned that the defendant's father abused alcohol and had become emotionally abusive upon discovering that the defendant's mother had a child as the result of an extramarital affair. Shortly after the discovery, the defendant's parents were divorced. Thereafter, the defendant's father did not provide either financial or emotional support. The defendant's stepfather, who also abused alcohol, attempted suicide and then divorced the defendant's mother. Dr. Miller concluded that the defendant suffered emotional trauma and neglect during his formative years.

Dr. Miller also learned that the defendant functioned above average intellectually and performed quite well in elementary school. He did observe, however, that the defendant was accident-prone and had suffered several cuts and burns which required regular treatment at emergency rooms. Although he was prescribed eyeglasses at the age of 12, the defendant was unable to afford eye care and did not continue to wear glasses.

Dr. Miller described the defendant as a follower, not a leader, and as one who was left on his own a great deal. He learned that the defendant began to associate with older boys and got into trouble for alcohol and marijuana usage and shoplifting. At age 14, the defendant, his brother, and two others broke into a Laundromat. Dr. Miller testified that the defendant was sent to Sullivan House for Children and received a greater degree of punishment after he left without permission. The defendant did not attend school regularly after his release from Sullivan House and his grades deteriorated.

Dr. Miller related that the defendant continued school into the eleventh grade. He worked part-time at a fast food restaurant and impregnated a girlfriend. According to Dr. Miller, the girlfriend moved away and never notified the defendant of his paternity. Later, the defendant learned through friends that the girlfriend had had his child. Dr. Miller reported that the defendant wanted to join the military but was not accepted because he had no high school diploma. As an adult, the defendant was convicted of possession of marijuana. He worked periodically as a cook and busboy. By age 19, he had been convicted of joyriding, DUI, and underage possession of alcohol. Later, he was cited for driving on a revoked license and his probation was revoked. The defendant lived with a friend for about six months in Augusta, Maine, and upon his return met Ms. Marshall, with whom he stayed until the death of the victim.

Dr. Miller described the defendant as having a dysfunctional family, as being emotionally neglected, and as having led a life devoid of any male role model. Dr. Miller described the common threads in the defendant's life as poverty and alcohol abuse.

Claude Robinson, a first cousin of the defendant, testified that he had at one time served in Kingsport as a recruiting officer for the United States Army. He stated that the defendant had taken an admission test for the military and had been targeted as a quality applicant. Robinson testified that the defendant's father would not provide the necessary permission for the defendant to join the military. He recalled that by the time the defendant reached the age of eighteen, the regulations for new recruits had been changed so that a high school diploma was necessary. It was Robinson's view that the military would have been a very positive influence in the life of the defendant.

Robert Miller, who had been "pretty much like [a brother]" to the defendant while they were in high school, testified that he and the defendant had both wanted to join the military. Miller, who was able to join the Marines, stated that his military experience had been very positive and that the defendant would have benefitted from military service.

Sharon Godsey, the defendant's mother, also testified on behalf of her son. She stated that the defendant's child had been left in her care at the age of two and one-half months for a period of six months. She stated that during this time, she had been given legal guardianship of the child and that the defendant had worked in order to provide financial assistance. She testified that when the child was eight and one-half months old, the child's mother took the baby on the pretext of having a photograph taken and never returned. Later, Ms. Godsey learned from a newspaper article that the child had been placed for adoption and that she had no legal rights. She testified that this incident had been devastating to the defendant. Ms. Godsey expressed her love for the defendant and asked the jury to spare his life.

The jury returned a sentence of death. Later, the trial court conducted a sentencing hearing on the aggravated child abuse conviction and imposed a consecutive twenty-five year term.³

³ While in jail awaiting trial on these charges, the defendant was charged with and later convicted of aggravated rape and conspiracy to commit aggravated rape. The effective sentence was 25 years. State v. Bobby G. Godsey and Allen Hoyle, Nos. 03C01-9803-CR-00121 and 03C01-9803-CR-00122 (Tenn. Crim. App., at Knoxville, Oct. 25, 1999). Application for permission to appeal was denied July 17, 2000.

(I)

The first issue is whether the 1995 amendments to Tennessee's first degree murder statute, Tenn. Code Ann. § 39-13-202, violate due process or amount to cruel and unusual punishment under the Tennessee and United States Constitutions. See Tenn. Const. art. I, § 8; U.S. Const. amend. VIII. The statute under which the defendant was prosecuted for felony murder provides, in pertinent part, as follows:

(a) First degree murder is: . . . (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse or aircraft piracy (b) No culpable mental state is required for conviction under subdivision (a)(2) . . . except the intent to commit the enumerated offenses or acts in such subdivisions.

Tenn. Code Ann. § 39-13-202(a)(2), (b) (emphasis added). Prior to 1995, aggravated child abuse was not one of the enumerated felonies capable of supporting a felony murder conviction. Additionally, the minimum culpable mental state required to support a felony murder conviction was one of recklessness. See Tenn. Code Ann. § 39-13-202(a)(2) (1991 Repl.). Chapter 460 of the Public Acts of 1995 added aggravated child abuse to the list of felonies available to support a felony murder conviction. The amendment further abolished the requirement that recklessness be found on the part of the offender.

The defendant contends that the 1995 amendments violate due process and constitute cruel and unusual punishment. As support for his claims, the defendant specifically asserts the following arguments: (1) that the due process restrictions our supreme court set forth in State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), bar the felony murder conviction under the amended statute unless the underlying felony "substantially increased the risk of harm over and above that necessarily present in the crime . . . itself," 817 S.W.2d at 306; (2) that the 1995 amendments are unconstitutional because they abolish the distinctions between the varying grades of homicide and that such distinctions are necessary to ensure proportionality in punishment and restrict the imposition of the death penalty; (3) that the amended statute allows for the imposition of the death penalty in the absence of a jury finding that the defendant exhibited "reckless disregard for human life [by] knowingly engaging in criminal activities known to carry a great risk of death"; and (4) that the amended statute allows for a felony murder conviction in the absence of the commission of a simultaneous, separate crime which causes death and that implied or express malice is required. In support of his last argument, the defendant asserts that the offenses that have traditionally triggered a felony murder prosecution have been separate and distinct from the acts that caused death.

Initially, the distinction between the underlying offense in a felony murder and the act causing death has been important for several reasons. The intent to commit the separate felony was considered the legal equivalent of malice:

In the typical case of felony-murder, there is no malice in 'fact' with respect to the homicide; the malice is supplied by the 'law'. There is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice.

State v. Kimbrough, 924 S.W.2d 888, 890 (Tenn. 1996).

This court has observed that the felony murder doctrine "predicates guilt of the murder not upon the culpability of the defendant with respect to the killing, but upon the culpability required for the underlying felony." State v. Gilliam, 901 S.W.2d 385, 390 (Tenn. Crim. App. 1995).

The 1995 amendments to Tenn. Code Ann. § 39-13-202 did, of course, add aggravated child abuse to the list of felonies capable of supporting a first degree murder conviction. The amendments also deleted the requirement that the killing be reckless, an element which had been added to the statute in 1989. State v. Barber, 753 S.W.2d 659 (Tenn. 1988), was decided under pre-1989 law, which did not require that the killing be reckless. In Barber, the defendant challenged the felony murder statute as violative of due process because a first degree murder conviction, and possibly a death sentence, could result even if the killing had been accidental or in self defense.⁴ Our supreme court rejected the challenge, holding that a first degree murder conviction emanating from the perpetration of a felony met constitutional safeguards. More recently, in State v. Kimbrough, our supreme court implicitly approved the concept of vicarious culpability. The court determined that attempted felony murder was not an offense and, in doing so, observed that "[f]elony- murder differs from other forms of murder because it holds the actor strictly accountable even where the killing is unintended." 924 S.W.2d at 890.

In our view, aggravated child abuse is no different than any of the other listed felonies which may support a felony murder conviction. Criminal intent is required for aggravated child abuse. The culpable mental state for the abuse "knowingly" transfers to the felony murder. See, e.g., State v. Gilliam, 901 S.W.2d at 385; 2 Charles E. Torcia, Wharton's Criminal Law § 147 at 296 (15th ed. 1994).

In Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879 (1956), our supreme court required the killing in a felony murder to be closely connected to the underlying felony, a view this court adopted in State v. Severs, 759 S.W.2d 935 (Tenn. Crim. App. 1988). The requirement for such a temporal, spatial alliance between the felony and the killing would not, however, warrant a "merger" of the

⁴ A minority of the states authorize felony murder where the underlying felony is abuse of a child: Arizona - A.R.S. § 13-1105; District of Columbia - D.C. Code 1981 § 22-2401 (also includes mayhem); Iowa - I.C.A. § 707.2 (also includes a forcible felony); Kansas - K.S.A. § 21-3401 (may also include murder, manslaughter, assault and battery); Michigan - M.C.L.A. 750.316; Oklahoma - 21 Okl. St. Ann. § 701.7; and Wyoming - W.S. 1977 § 6-2-101. Some states authorize felony murder when death occurs during the course of any felony: Arkansas - A.C.A. § 5-10-102; Delaware - 11 Del. Code Ann. 1953, § 636; and Illinois - 720 Ill. Comp. Stat. Ann. 5/9-1.

crimes or the application of an Anthony-type due process risk of harm analysis, as suggested by the defendant, so as to preclude the felony murder conviction. In People v. Viser, 343 N.E.2d 903 (1975), decided in a state where an assault may support a felony murder prosecution, the court upheld a felony murder conviction based on aggravated battery as the underlying felony. The Illinois court approved the legislative objective to deter the commission of the enumerated felonies by holding the perpetrator accountable for any death that might result. Id. at 909. The legislative history accompanying the passage of the 1995 amendment to Tenn. Code Ann. § 39-13-202 suggests a similar objective.

The assault-type cases cited by the defendant, wherein the merger doctrine, by implication, might have arguably precluded a felony murder conviction, or at least a conviction for the underlying felony, did not involve child abuse. For example, in Dunford v. State, 702 P.2d 1051 (Okla. Crim. App. 1985), the felony of pointing a gun was not sufficiently independent to qualify as an underlying felony for felony murder purposes when the defendant, moments after pointing the gun, actually shot the victim. The defendant's second degree murder conviction was upheld, however, after an instruction on felony murder was found to be harmless error. In State v. Miller, 520 P.2d 1113 (1974), the defendant broke into the home of his estranged wife with the intent to assault her. The defendant's wife was struck in the hand by a bullet and her boyfriend was mortally wounded. The Arizona Supreme Court agreed with the defendant's contention that the assault could not justify a felony murder instruction because it merged into the homicide. Nevertheless, the court upheld the trial court's felony murder instruction where the defendant's burglary was an alternative basis therefor. Neither case is persuasive authority for application of the merger doctrine to the circumstances involved in this case. In Mapps v. State, 520 So.2d 92 (Fla. App. 4th Dist. 1988), the Florida District Court of Appeals rejected the notion of merger in a felony murder case where the triggering felony was an assault and upheld separate convictions as compliant with legislative intent.

In State v. Anthony, our supreme court precluded a conviction for a kidnaping that was incidental to a robbery. 817 S.W.2d at 306-07. While Anthony involved the issue of multiple convictions based upon the same acts or transaction, this case nevertheless would pass the "substantial increase in the risk of harm" test employed in that case by our supreme court. The victim here suffered a broken arm at the hands of the defendant before receiving the more serious injuries to his spine and the head. The defendant then left the unconscious victim unattended for over an hour before taking any remedial action. According to experts, the delay was a critical factor in the death of the victim. In our view, the due process constraints identified in Anthony would not preclude dual convictions.

In Tenn. Code Ann. § 39-13-202, the General Assembly has expressed an unmistakable intent to have aggravated child abuse resulting in death qualify as felony murder. The course of events that led to the amendment of the statute is well documented since the ruling in State v. Bowers, No. 115 (Tenn. Crim. App., at Knoxville, Aug. 2, 1989). The legislature does not intend for the merger doctrine to preclude a first degree murder conviction where death is the consequence of an aggravated child abuse.

Furthermore, the ruling in Tison v. Arizona, 481 U.S. 137 (1987), does not afford the defendant relief. That case considered the appropriateness of the death penalty for an accomplice in a shooting death where fatal shots were fired by the primary actor. While the defendant points out that in Tison, the Supreme Court required reckless indifference for human life as a prerequisite to the implementation of the death penalty, we note that the culpable mental state for aggravated child abuse, which transfers to the felony murder, is "knowing." Because "knowing" is a higher standard than "reckless indifference," compare Tenn. Code Ann. § 39-11-106(a)(2)(20) (definition of "knowing") with Tenn. Code Ann. § 39-11-106(a)(31) (definition of "reckless"), reliance upon aggravated child abuse to support a felony murder conviction is in accord with the principles of Tison.

The defendant also argues that when the 1995 amendments dispensed with the reckless mens rea requirement, Tenn. Code Ann. § 39-13-202 could no longer support a capital sentence. For the same reasons that the statute does not offend the pronouncement of the United States Supreme Court in Tison, it supports application of the death penalty. The "knowing" requirement necessary to support an aggravated child abuse precludes imposition of the death penalty in cases involving mere inadvertence on the part of the defendant. This argument is without merit.

In our view, Tenn. Code Ann. § 39-13-202 meets the applicable constitutional due process safeguards.

(II)

The defendant's second issue is whether the state may seek the death penalty for a felony murder in the perpetration of aggravated child abuse where the sole aggravating circumstance is that the victim is under twelve years of age. The indictment charged and the jury convicted the defendant of "unlawfully and feloniously kill[ing] . . . Evan Price, a child 7 months of age, in the perpetration of or attempt to perpetrate the felony offense of aggravated child abuse." The single aggravating circumstance found and applied by the jury in imposing the death penalty was that the "murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann. § 39-13-204(i)(1). The defendant contends that the aggravating circumstance of the victim's age duplicates the age element of the offense of child abuse and therefore does not sufficiently narrow the class of death-eligible defendants under the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. We disagree.

In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), our supreme court ruled that under the Tennessee Constitution, felony murder is a death-eligible offense, but that the death penalty may not be imposed unless the jury finds an aggravating circumstance other than the murder having been committed during the perpetration of a felony. In doing so, the court reaffirmed prior decisions in which it held that "the death penalty in felony murder does not per se violate Article I, § 16 of the Tennessee Constitution." Id. at 341. The primary concern in Middlebrooks was whether the

application of Tenn. Code Ann. § 39-2-203(i)(7),⁵ that the murder was committed during the perpetration of a felony, as the sole aggravating circumstance in imposing the death penalty for first degree felony murder served to narrow the class of death-eligible defendants, a concept recognized by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), and under Article I, Section 16 of the Tennessee Constitution. At the time of the trial in Middlebrooks, the felony murder aggravating circumstance was defined as follows:

The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb

Tenn. Code Ann. § 39-2-203(i)(7) (1982). The supreme court observed that subsection 203(i)(7) "essentially duplicates" the elements of first degree felony murder. Middlebrooks, 840 S.W.2d at 341; see also Tenn. Code Ann. § 39-2-202(a) (1982). It determined that the same felony used as the predicate for a felony murder conviction must be reconsidered by the jury in essentially the same form as an aggravating circumstance in the penalty phase of the trial. After a comparison of the statutory similarities, the court considered whether this "duplication" complied with the requirement that an aggravating circumstance "'genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Middlebrooks, 840 S.W.2d at 342 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). A majority of the court ultimately concluded that subsection 203(i)(7) did not achieve any narrowing of death-eligible defendants such as is required by the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution:

Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.

Id. at 342 (quoting Engberg v. State, 686 P.2d 541, 560 (Wyo. 1984)). Based upon the provisions of the Tennessee Constitution, our supreme court ruled that in order to serve as a legitimate basis for the death penalty, an aggravating circumstance must have the effect of narrowing the class of those eligible for the ultimate punishment:

⁵This statute was repealed in 1989.

[I]n light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense.

Id. at 346.

The amended felony murder statute, under which the defendant in this case was convicted, provides as follows:

(a) First degree murder is: . . . (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse or aircraft piracy

Tenn. Code Ann. § 39-13-202(a)(2) (1996 Supp.).

Child abuse is defined as follows:

(a) Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare commits a Class A misdemeanor; provided, that if the abused child is six (6) years of age or less, the penalty is a Class D felony.

Tenn. Code Ann. § 39-15-401(a) (emphasis added). Child abuse becomes aggravated when the "act of abuse results in serious bodily injury to the child; or . . . a deadly weapon is used." Tenn. Code Ann. § 39-15-402(a).

The aggravating circumstance relied upon by the jury in imposing the death penalty in this case provides as follows: "The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann. § 39-13-204(i)(1). Aggravated child abuse may be committed against a person who is under 18 years of age, but the aggravating circumstance supporting the death sentence only applies if the victim is less than 12 years of age.

In State v. Lacy, 983 S.W.2d 686, 696 (Tenn. Crim. App. 1997), this court addressed the issue:

We further note that the use of this aggravating circumstance is not "double enhancement" in this case. The statutory age element is a child less than sixteen years of age while the aggravating circumstance age element is a person less than twelve years of age. Thus, had the defendant been convicted of first-degree murder by aggravated child abuse of a fourteen-year-old child, the aggravating circumstance could not apply. In addition, the aggravating circumstance requires another element, that is, that the defendant must be eighteen years old or older. Therefore, it is our conclusion that this circumstance applies to this defendant regardless of any arguments about "double enhancement."

Id. at 696 (emphasis added).

Based upon the ruling in Lacy, this court concludes that the aggravating circumstance applied here does sufficiently narrow the class of death-eligible defendants. A defendant convicted of felony murder in furtherance of aggravated child abuse may be sentenced to death based upon the felony murder aggravator only if the victim is less than twelve years of age. The statute recognizes that victims under twelve years of age are typically more vulnerable to abuse than those between thirteen and seventeen. The younger the victim, the less likely it is that he or she is capable of defending him or herself or fleeing. Infant or toddler victims may often be unable to testify or to identify their assailants and, depending on how young they are, may be unable to either articulate or even comprehend the abuse they have suffered. In our view, there is a legitimate state interest in affording heightened protection to those most vulnerable in our society. Thus, the age aggravating circumstance sufficiently and meaningfully narrows the class of death-eligible defendants convicted of felony murder in the perpetration of aggravated child abuse.

(III)

The third issue is whether the death sentence imposed upon the defendant is disproportionate under Tenn. Code Ann. § 39-13-206(c)(1)(D) or under the Tennessee or United States Constitutions. The defendant submits that a comparison of the "pool" of first degree murder cases in which age was found to be an aggravating factor demonstrates that he is the least culpable and the least deserving of the punishment of death of any defendant in a first degree murder case involving a child victim. The defendant submits that he is the only person sentenced to death where age was the single aggravating circumstance. The defendant contends that this case did not involve chronic child abuse, multiple beatings, or a "torturing type" death and that there is no evidence that he intended to kill or even injure the victim. He argues that his prior criminal record consists only of misdemeanor convictions, none of which involve children. He also maintains that he is a good candidate for

rehabilitation. The defendant contends that he cooperated with authorities by providing statements and by allowing the collection of evidence in his residence.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court upheld the Georgia capital sentencing scheme, which required the Georgia Supreme Court to "review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and '[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'" Id. at 204. The Court, in doing so, specifically approved appellate proportionality review as "a check against the random or arbitrary imposition of the death penalty." Id. at 206.

The Tennessee capital sentencing procedure, effectively invalidated by Furman v. Georgia, 408 U.S. 238 (1972), was replaced in 1977 in response to the Gregg decision. The 1977 enactment, which serves as the basis for our current capital sentencing statute, includes a comparative proportionality review process similar to that approved in Gregg. In Pulley v. Harris, 465 U.S. 37 (1984), the Supreme Court determined that the United States Constitution did not, in fact, require a proportionality review. Nevertheless, a proportionality review must be undertaken in capital cases in Tennessee pursuant to Tenn. Code Ann. § 39-13-106(c)(1)(D) (1997).

A comparative proportionality review begins with the presumption that the sentence of death is appropriate for the crime of first degree murder. State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997). Courts of review must compare the defendant and the nature of his crime with the crimes in other cases in which the state has sought the death penalty. This "precedent-seeking approach" requires that (1) the defendant be convicted of first degree murder, and (2) a capital sentencing hearing take place. The purpose of the review is to identify aberrant, arbitrary, or capricious sentences by determining whether the death penalty imposed by the jury is "'disproportionate to the punishment imposed on others convicted of the same crime.'" State v. Bland, 958 S.W.2d 651, 662 (Tenn. 1997) (quoting Pulley, 465 U.S. at 42-43). The precedent-seeking method of proportionality review requires a comparison of "the case before it to other cases in which defendants were convicted of the same or similar crimes by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved." Id. at 664.

Many factors apply in the comparison of the circumstances of capital crimes: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances, including age, physical, and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect on nondecendent victims. Id. at 667.

In comparing capital case defendants, other factors must be considered: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional, or physical condition; (4) the defendant's involvement or role in the

murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of the victim(s); and (8) the defendant's capacity for rehabilitation. Id.

The aim of proportionality review is to assure that no aberrant death sentence is approved. Id. at 665. Yet a death sentence is not necessarily disproportionate even when a comparison of cases, one involving a life sentence and the other capital punishment, yields "no discernable basis for the difference. . . ." Id. An "isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." Gregg, 428 U.S. at 208. Similar cases, for purposes of proportionality review, include "all cases . . . in which the defendant is convicted of first degree murder." Tenn. Sup. Ct. R. 12. In Bland, however, the comparison was limited to those cases involving a separate hearing to determine whether the sentence should be life, life without parole, or death. Bland, 958 S.W.2d at 666.

After a review of the similar cases, our task requires consideration of a "multitude of variables, some of which were listed in Bland, in light of the experienced judgment and intuition of the members of this Court." State v. Cribbs, 967 S.W.2d 773, 790 (Tenn. 1998). Courts are not limited to the factors identified in Bland. State v. Henderson, ____ S.W.3d ____ (Tenn. 2000), No. W1998-00342-SC-DDT-DD, 2000 WL 949217 (July 10, 2000). If this case, taken as a whole, clearly lacks circumstances found in similar cases in which the death penalty is imposed, our duty is to set aside the death penalty as arbitrary. Bland, 958 S.W.2d at 665.

An analysis of the circumstances of the crime is required by Bland. Here, the defendant, who had no prior history of abusive behavior toward children and who had served as a caretaker for the infant victim and his two siblings for months, reacted angrily and unexpectedly to persistent crying and, through one or more acts of violence, administered severe, and ultimately fatal, injuries. There was no proof of premeditation. By any interpretation of the facts, there was inadequate provocation and no justification for the attack. The adverse effect of the defendant's act upon the victim's family, including the victim's mother, siblings, and extended family, is immeasurable.

As indicated, a comparison of the defendant with other capital case defendants is also required by Bland. Here, the defendant had prior misdemeanor convictions for DUI, driving on a revoked license, and joyriding. While the defendant was relatively youthful at the time of the offense (22 years of age), other personal characteristics—he is a male Caucasian—are of little consequence to the state or the defense. Other than irritation due to his efforts to stop smoking, the defendant could cite no mental or physical conditions as relevant factors. As to the other Bland factors, the defendant was solely responsible for the victim's death—both in the degree of the assault and in his failure to seek timely treatment. He cooperated with authorities during the investigation of the physical evidence. The defendant, however, was not immediately candid in his statements to police; it is doubtful, in fact, that he was ever completely truthful. As confirmed by several independent witnesses, the defendant demonstrated genuine remorse for the victim at the hospital upon learning of his inevitable death. A capable worker, the defendant is reasonably intelligent and has

demonstrated responsible child care in the past. The victim, at seven months of age, was particularly vulnerable, something the defendant had to know. Certainly, the defendant had the capability to handle these circumstances in a productive manner but did not do so. The overall circumstances, at least those included in the record in this case, suggest an amenability to rehabilitation.

Initially, we observe that the 1995 amendment to Tennessee's first degree murder statute, which made aggravated child abuse an enumerated felony capable of supporting a conviction, was adopted due in great measure to the public outrage over the defendant's second degree murder conviction in State v. Bowers, supra. The pertinent facts, summarized as follows, are in stark contrast to those at issue:

Kerry Phillip Bowers lived with his girlfriend, Tammy Trexler, and her son, Scotty, in a trailer on Thorps Chapel Road in Hawkins County, Tennessee. Bowers, who was unemployed, babysat while the child's mother was at work. Bowers brutalized Scotty Trexler, inflicting beatings, burns, and other abuses in numerous, separate assaults extending over a period of months. Despite the seriousness of his various injuries, Scotty rarely received medical treatment. His mother explained that she feared he would be taken away. On May 29, 1987, Scotty Trexler died at the age of 21 months.

The forensic pathologist who performed the autopsy described the child's injuries as multiple and severe. The child suffered extensive facial burns, chest and back injuries, bulging bruises on the upper inside of each thigh near the scrotum, and hemorrhaging underneath his skin. The adductor muscles, which pull the legs together, had been torn apart, and each hip joint had been yanked from its socket. Multiple injuries caused a compression of the brain into the spinal column, which in turn cut off the blood supply to the respiratory organs, ultimately causing the child's death.

The Trexler Saga: Hale and Middlebrooks, 23 Memphis State L. Rev. 319 (1993). Bowers essentially brutalized the victim in an unconscionable manner over an extended period of time, yet was convicted only of second degree murder. Under these circumstances, the death penalty, in our assessment, would meet the proportionality standards. The circumstances here do not. Our conclusion is based upon extensive research. Several first degree murder cases in this jurisdiction and a number of decisions in other states demonstrate that circumstances such as these generally result in a sentence of life or life without parole.

Our search for precedent has yielded ten Tennessee cases with crimes and defendants sufficiently similar to the crime and defendant in this case to warrant comparison for purposes of a proportionality review. In the first such case, State v. Vann, 976 S.W.2d 93 (Tenn. 1998), the defendant was sentenced to death for the incest and felony murder of his eight-year-old daughter.

The jury found three aggravating circumstances: the age of the victim, the defendant's prior violent convictions for rape, and the murder was heinous, atrocious, and cruel. Id. at 96.

In State v. DuBose, 953 S.W.2d 649 (Tenn. 1997), the defendant was sentenced to life in prison for first degree murder by aggravated child abuse. The victim was 16 months old and died as a result of an abdominal blow which was inflicted within 24 hours of death and which caused massive internal bleeding. Id. at 650. Medical examiners found substantial evidence of earlier abuse. Id. at 651. After a sentencing hearing, the jury sentenced the defendant to life imprisonment. State v. James DuBose, No. 01C01-9405-CC-00160, slip op. at 13 (Tenn. Crim. App., at Nashville, Aug. 25, 1995). On appeal, our supreme court affirmed the defendant's conviction and sentence. DuBose, 953 S.W.2d at 655.

In State v. Hale, 840 S.W.2d 307 (Tenn. 1992), the defendant was convicted of first degree murder under the 1988 amendment to the statute, which eliminated the state's burden of proving that the killing was willful, deliberate, malicious, and premeditated when the victim was under 13 years of age and death resulted from child abuse. After concluding that the murder was heinous, atrocious, and cruel and that the victim was under 12 years of age, and that these aggravating circumstances outweighed the mitigating circumstances, the jury imposed the death penalty. On appeal, our supreme court held that the 1988 amendment, which allowed for a first degree murder conviction where a death occurred from child abuse, a misdemeanor, violated due process under the Tennessee Constitution. It held that under the circumstances, where the defendant had caused the victim's death by an exaggerated degree of physical discipline, the death penalty was disproportionate. During the course of the trial, the state proved that the 19-year-old defendant, who resided with the victim's mother, regularly administered corporal punishment upon the two-and-one-half-year-old victim, ultimately causing his death. Id. at 308. A series of beatings for such things as "defecating and urinating in his clothes" ultimately resulted in lacerations to the victim's liver and small bowel mesentery so extensive as to cause death. Id. at 309. The imposition of the death penalty for a murder committed during the perpetration of child abuse, a misdemeanor, was deemed disproportionate—a penalty never before approved "for a 'murder' committed during the perpetration of a misdemeanor." Id. at 314.

In State v. Brown, 836 S.W.2d 530, 535 (Tenn. 1992), the defendant caused the death of his four-year-old son by violently shaking him back and forth. This caused a brain injury which resulted in swelling and sickness, and the child asphyxiated on his own vomit. Id. at 534. There were several other injuries which were consistent with prior child abuse. Id. The defendant was originally convicted of first degree murder and sentenced to death at the conclusion of a separate penalty hearing. Had the defendant's conviction been sustained, this case would have been instructive for purposes of this proportionality review. On appeal to our supreme court, however, the defendant's conviction was modified to second degree murder because the evidence was insufficient to establish premeditation and deliberation, which elements were specifically required at that time in order to support first degree murder. The court found that there was proof of malice, but that the killing was committed in the heat of passion without adequate provocation.

In State v. Irick, 762 S.W.2d 121 (Tenn. 1988), the defendant raped and murdered a seven-year-old girl. The jury sentenced the defendant to death based on the same four aggravating factors found in State v. Coe. Id. at 124.

In State v. Coe, 655 S.W.2d 903 (Tenn. 1983), the defendant abducted, raped and brutally murdered a young girl and was sentenced to death. The jury found four aggravating circumstances which warranted the death penalty: the age of the victim, the killing was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, the killing was committed to avoid prosecution, and the killing was done while committing a felony. Id. at 905.

In State v. Hodges, 7 S.W.3d 609 (Tenn. Crim. App. 1998), the female victim was two years and four months old. She had bruises on her face, arms, and legs, abrasions on her hands and legs, and lacerations to her nose and lips. Hair had been pulled from her head. An autopsy revealed other cuts, contusions, and abrasions to her tongue, chin, lips, ear, abdomen, buttocks, knee, heel, and hands—many of which were described as defensive wounds. There was hemorrhaging between the brain and skull and her liver had been lacerated. Death was caused by blunt force injury to the head and torso. Id. at 615. The victim had been dead for several hours before medical personnel were called to the scene. While accepting responsibility for the death of her daughter, the mother of the child also blamed the defendant who, babysitting for the victim much of the day while the mother was at work, claimed that the victim had fallen in the bathroom. The defendant was convicted of aggravated child abuse and sentenced to 25 years. He was also convicted of felony murder and sentenced to life without the possibility of parole based on two aggravating factors: that the murder was committed against a person less than 12 years of age by a person 18 years of age or older, and that the murder was heinous, atrocious, or cruel. While this court affirmed Hodges' convictions and sentences, the opinion included little information about his social history or his prior criminal record.

In State v. Lacy, the defendant was convicted of first degree murder by aggravated child abuse for the death of the five-year-old victim, the son of the defendant's girlfriend. 983 S.W.2d at 687. The child died from multiple blunt force injuries causing him to endure painful internal bleeding for about two to six hours before bleeding to death. Id. at 690. The defendant did not seek medical attention for the child. An expert at trial testified that the victim would have survived the injuries had he been treated and that the child had been subjected to a horrific pattern of physical abuse. Id. The jury found two aggravating factors, that the murder was committed against a person less than 12 years old by a defendant over the age of 18, and that the murder was especially heinous, atrocious, or cruel. After a separate sentencing hearing, in which the state did not seek the death penalty, the defendant was sentenced to life imprisonment without the possibility of parole.

In State v. James Lloyd Julian II, No. 03C02-95110-CV-00370 (Tenn. Crim. App., at Knoxville, July 24, 1997), the death penalty was not imposed where the defendant, an acquaintance of the family of the victim, was convicted of the rape and murder of a three-year-old child. After abducting the child, who had been left by the parents to the care of a babysitter, the defendant took her to a remote area and raped her, choked her to death, and threw her body into some underbrush. When questioned by police, he initially lied about the incident. In the penalty phase of the trial, the

defendant was sentenced to life without parole. While the jury did find the murder was especially heinous and applied the age aggravating circumstance, it concluded that the mitigating evidence, which included a history of polysubstance abuse and prior sex abuse by a grandfather, outweighed the aggravating factors.

In State v. Bibbs, 806 S.W.2d 786 (Tenn. Crim. App. 1991), the defendant sexually assaulted and then beat an eleven-year-old girl. He then threw her from a third floor balcony. Id. at 788. The defendant was found guilty of premeditated murder and was sentenced to life in prison. Id. at 789. The state did not seek the death penalty. This case was concluded prior to the enactment of legislation authorizing a sentence of life without the possibility of parole.

Cases from other jurisdictions provide some context regarding when the death penalty has been approved for proportionality purposes and when it has not. For example, in Ward v. State, No. CR-98-0800, 2000 WL 127207 (Ala. Crim. App., Feb. 4, 2000), the defendant was convicted of first degree murder for the suffocation of his four-month-old son. An autopsy revealed that the victim had suffered multiple fractures to the arms and ribs and damage to his toenails and fingernails, indications of instances of torture or extreme abuse. Id. The victim had also suffered a spiral fracture of his right arm the day before his death. Id. The causes of death were established as multiple blunt force injuries and suffocation. Id. On the jury's recommendation, the trial court imposed the death sentence based on the aggravating circumstance that the murder qualified as heinous, atrocious and cruel. The Alabama Court of Criminal Appeals affirmed the conviction and sentence.

In State v. Jones, 937 P.2d 310 (Ariz. 1997), the defendant was convicted of sexual assault, child abuse and felony murder. The Supreme Court of Arizona upheld the convictions and an attendant sentence of death on the murder charge. The defendant had struck the four-year-old victim several times on the day before the child's death. Id. at 313. One blow was severe enough to rupture the child's small intestine, which resulted in death due to peritonitis. Id. The aggravating factors were that the murder was especially cruel and the victim was less than 15 years old. No statutory or non-statutory mitigating factors were established.

In State v. Milke, 865 P.2d 779 (Ariz. 1993), the Supreme Court of Arizona upheld the death penalty for a female defendant convicted of first degree murder, conspiracy to commit first degree murder, kidnapping, and child abuse for the murder of her four-year-old son. The defendant had no prior criminal record but two aggravating factors were found to warrant the sentence: that the defendant was an adult and the victim was less than fifteen years old and that the murder was committed in an especially heinous and depraved manner. The evidence established that the defendant wanted to kill her son in order to prevent him from turning out like his father. Id. at 782. She enlisted the aid of her boyfriend, who shot the victim to death and disposed of his body in the desert, to carry out her wishes. Id.

In State v. Kiles, 857 P.2d 1212 (Ariz. 1993), the defendant was convicted on three counts of first degree murder and two counts of child abuse for an attack upon his girlfriend and her two

children, ages five and nine months. Id. at 1216. He received 22 years for the child abuse convictions and the death penalty for each of the first degree murder convictions. Id. at 1215. The defendant shot the three victims after arguing with his girlfriend over money and drugs. Id. The Supreme Court of Arizona upheld the convictions and sentences.

In State v. Lopez, 847 P.2d 1078 (Ariz. 1992), the defendant was convicted of child abuse and felony murder in connection with the death of his one-year-old son. He received a sentence of 22 years for the child abuse conviction and the death penalty for the felony murder conviction. Id. at 1081. The Supreme Court of Arizona upheld both the convictions and the sentences. Evidence showed that the victim died as a result of peritonitis, an infection of the lining of the abdomen caused by a ruptured intestine. Id. at 1083. The defendant struck the victim in the abdomen severely enough to cause the peritonitis. Id. The victim's mother wanted to take him to the hospital, but the defendant would not allow her to do so. Id. at 1081. The jury found two aggravating factors on the child abuse charge: the defendant inflicted serious physical harm to cause the abuse, and the abuse was committed in a heinous, cruel or depraved manner. There were two aggravating circumstances found on the felony murder charge: the murder was committed in a heinous, cruel or depraved manner, and the victim was less than 15 years of age at the time. No mitigating factors were found.

In Lukehart v. State, No. SC90507, 2000 WL 796061 (Fla., June 22, 2000), the defendant, convicted of first degree murder and aggravated child abuse, was sentenced to death for the killing of a five-month-old girl. The defendant, who was the boyfriend of the victim's mother, admitted to police that he had shaken the victim and dropped her on her head. When the defendant realized that the victim was dead, he disposed of her body in a pond and claimed that she had been kidnapped. The trial court found three statutory aggravators: (1) that the murder was committed during the perpetration of aggravated child abuse, a felony; (2) that the victim was under 12 years of age; and (3) that the defendant had a prior violent felony conviction and was on felony probation at the time of the offense. On appeal, the Florida Supreme Court affirmed the defendant's murder conviction and death sentence.

In Davis v. State, 703 So.2d 1055 (Fla. 1997), the 22-year-old defendant was convicted of the first degree murder, aggravated child abuse and sexual battery of the two-year-old victim. The Supreme Court of Florida held that the death penalty in that case was not disproportionate based on evidence of the defendant's three prior convictions and the two aggravating factors which were found: the murder was committed during a sexual battery and the murder was especially heinous, atrocious or cruel. Id. at 1062. No statutory mitigating factors were established and the non-statutory mitigating factors were deemed to be slight at best.

In Cardona v. State, 641 So.2d 361 (Fla. 1994), the defendant was convicted of aggravated child abuse and first degree murder in connection with the death of her three-year-old son. She was sentenced to death on the murder conviction. The victim's battered body was discovered underneath the bushes of a residence in Miami Beach, Florida. Id. The defendant had beaten the victim with a baseball bat on the day he died, but medical evidence indicated that the child died not from that single incident of abuse, but rather from several months of severe abuse and neglect. Id. at 362. The

single aggravating factor applied in the case was that the murder was especially heinous, atrocious, or cruel. It was found to outweigh any mitigating factors. On appeal, the Florida Supreme Court affirmed the defendant's convictions and sentence.

The circumstances in State v. Smalley, 546 So.2d 720 (Fla. 1989), are particularly helpful in evaluating the gravity of the crime at issue here. Smalley resided with Cecilia Cook and her three children from a prior relationship. Babysitting for the children while Ms. Cook worked, the defendant struck the victim, Julie Cook, who was two years and four months old, in an effort to stop her from crying:

This quieted her, but soon she began crying and whining again, so Smalley again struck her. This pattern went on throughout the day, with one variation. On three separate occasions, he repeatedly dunked Julie's head into water. Shortly after the third episode failed to stop Julie from crying, Smalley picked her up by her feet and banged her head on a carpeted floor several times. Julie lost consciousness at this point, but was still breathing. Smalley wrapped her in a sheet and put her on his waterbed. When he checked three hours later, Julie had quit breathing. Smalley and a neighbor tried cardiopulmonary resuscitation, to no avail, and the child was rushed to the doctor, who pronounced her dead. An autopsy determined that she died of a cerebral hemorrhage. The entire episode of abuse had taken about eight hours. After initially claiming that the child had fallen in the bathtub, Smalley gave police a detailed statement.

Id. at 721. The defendant was convicted of felony murder with child abuse as the underlying felony and sentenced to death based upon the heinous, atrocious, and cruel aggravating circumstance. The Florida Supreme Court, which also utilizes the precedent-seeking method of proportionality analysis, modified punishment to a life sentence without the possibility of parole. Concluding that it was unlikely that the defendant intended to kill the victim, the high court based its decision to modify the defendant's sentence on the defendant's lack of significant criminal activity, diagnosis of depression, impaired ability to appreciate the criminality of his conduct, good work record, demonstrated prior care of the victim, and genuine remorse. The court concluded that "the entire picture of mitigation and aggravation did not warrant the death penalty." Id. at 723.

Because this is the first case in which capital punishment has been imposed under the 1995 amendment to Tenn. Code Ann. § 39-13-202, this court has, in an effort to conduct an appropriate proportionality review, expanded the scope of its research to include other jurisdictions within the United States. A review of relevant case law from those jurisdictions indicates that the death penalty has typically been imposed only in those cases involving multiple aggravating factors or in cases involving circumstances even more egregious than these.

The state of Florida upheld the death penalty for the defendant in Dobbert v. State, 328 So.2d 433 (Fla. 1976). In Dobbert, the defendant was convicted of first degree murder, second degree murder, child torture, and child abuse in connection with the killing of his two children. Id. at 434. The evidence showed that the defendant had subjected his children to severe abuse over a significant amount of time, which ultimately resulted in their deaths. Id. at 435.

In State v. Aragon, 690 P.2d 293 (Idaho 1984), the Supreme Court of Idaho upheld the death sentence for a defendant convicted of the first degree murder beating death of his eight-month-old child. An autopsy showed that the victim died as a result of at least three blows to the head. Id. at 296. At the sentencing hearing, the jury found no mitigating circumstances and three aggravating circumstances: the murder was especially heinous, atrocious, or cruel, the defendant showed an utter disregard for human life, and the defendant exhibited a propensity to commit murder and posed a threat to society based on his prior criminal record, which included convictions for child abuse and assault with a deadly weapon.

In State v. Tye, 565 N.E.2d 2d 931 (Ill. 1990), the defendant was convicted of the murder of his three-year-old daughter and sentenced to death. When the victim refused to go to bed, the defendant began to beat her with a belt and then continued to beat her with an electrical cord. Id. at 934. The defendant testified that the beating lasted for over an hour. Id. The child eventually died as a result of the injuries inflicted. Id. at 936. No mitigating factors were established. Two aggravating circumstances were found to support the imposition of the death penalty: the victim was less than 12 years old and death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty. The Supreme Court of Illinois upheld the conviction and death sentence.

In State v. Anderson, 513 S.E.2d 296 (N.C. 1999), the defendant, the girlfriend of the victim's uncle/custodian, was convicted of first degree murder on the basis of premeditation, on the basis of torture, and under the felony murder rule. She was also convicted of felonious child abuse. There was proof that the defendant forced food down the throat of the two-and-one-half-year-old victim, shoved paper towels into the victim's throat to stop her from crying, struck the victim with a shoe, bit the victim, and deprived the victim of liquids.⁶ The defendant received a sentence of three years for the felonious child abuse conviction and was sentenced to death for the first degree murder conviction. Both sentences were upheld by the Supreme Court of North Carolina. The victim was two and one-half years old at the time of her death and there was evidence of abuse which had occurred over several days or weeks. The single aggravating circumstance was that the murder was especially heinous, atrocious, and cruel.

In State v. Elliott, 475 S.E.2d 202 (N.C. 1996), the defendant was convicted of first degree murder and child abuse. He received the death penalty for the first degree murder conviction and a sentence of ten years imprisonment for the child abuse conviction. The Supreme Court of North

⁶The North Carolina Supreme Court cited and compared each of the seven cases in which the death penalty had been found disproportionate in that state. See Anderson, 513 S.E.2d at 319-320.

Carolina upheld the convictions and sentences. On the day before the death of the two-year-old child, the defendant punished the child by slamming her head into the floor five or six times. Id. at 207. The autopsy of the child revealed several old bruises and other signs of abuse by the defendant over time. Id. at 208. The single aggravating factor was that the murder was especially heinous, atrocious or cruel.

In Fairchild v. State, 998 P.2d 611 (Okla. Crim. App. 1999), the defendant was convicted of first degree murder of a three-year-old child. The jury found one aggravating circumstance, that the murder was especially heinous, atrocious and cruel, and set the punishment at death. The victim, who weighed 24 pounds at the time of his death, died as a result of brain damage caused when he was thrown against the vertical surface of a drop-leaf table by the defendant, who was the boyfriend of the victim's mother. Id. at 615. The victim had awakened during the night and cried. The defendant struck the victim and, when he did not stop crying, the defendant held his chest and buttocks against a hot wall heater, causing severe second-degree, grid-pattern burns. Id. The more the victim screamed, the more violent the defendant became. Id. One of the blows ruptured the victim's ear drum before the defendant threw the victim against the table. Id. Severe hemorrhaging and swelling of the brain caused the death. Id. The autopsy indicated that the victim had sustained as many as 26 blows. Id. The Oklahoma Court of Criminal Appeals affirmed the defendant's conviction and sentence.

In Malicoat v. State, 992 P.2d 383 (Okla. Crim. App. 2000), petition for cert. filed, (July 7, 2000), the Oklahoma Court of Criminal Appeals affirmed the defendant's conviction for first degree child abuse murder and death sentence, which was based upon two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel; and (2) the probability that defendant would commit future criminal acts of violence constituting a continuing threat to society. The defendant, the boyfriend of the victim's mother, struck the victim's head on a bedframe one or two days before her death. Id. at 392. On the date of the victim's death, the defendant struck her hard in the stomach on two separate occasions. Id. He claimed that when she stopped breathing, he gave her CPR. Id. When she began to breathe, he gave her a bottle in her crib and went to sleep. Id. When he woke five hours later, she was dead. Id.

None of these cases is exactly like the case at issue. Here, there was no evidence that the defendant had previously abused the victim. A medical examination of the victim some 12 days before this incident revealed no indication of prior physical abuse. The defendant, a dependable employee, had provided care for the victim over a period of time and was, in fact, charged with the care of the victim on the same afternoon of the murder. All of the testimony offered at trial suggests that the defendant had held a fatherly affection for the victim and had successfully discharged his supervisory responsibilities on prior occasions. The state made no effort to prove either premeditation or intent to kill. The proof established that death occurred as a result of the defendant's spontaneous, violent reaction to an unsuccessful effort to quiet the cries of a seven-month-old child. The evidence suggests that the assault, while brutally forceful, had a total duration of only moments. Although the defendant placed the injured victim in a crib and left him unattended for approximately one hour, he telephoned 911 when alerted to the condition of the victim and

attempted cardiopulmonary resuscitation. Independent witnesses who observed the defendant at the hospital confirmed that he exhibited genuine remorse. The defendant cooperated with the investigation and ultimately accepted responsibility for the death of the victim and yet was repeatedly untruthful in describing the course of events to police, minimizing the degree of his culpability. Additionally, a mistake in the medical treatment may have lessened the victim's chances of survival.

Again, no other case has authorized the death penalty based only upon the aggravating factor dealing with the relative ages of the victim and the defendant. Tenn. Code Ann. § 39-13-204(i)(1). While that does not mean that the single aggravating circumstance would never warrant imposition of the death penalty, a proportionality analysis mandates not only an examination of the aggravating and mitigating circumstances, but also close scrutiny of the particular defendant, as compared to others, and the circumstances of the crime, as compared to others.

When measured against other capital cases in this state, as well as capital cases in other jurisdictions, this case stands at one end of the spectrum, with the least evidence of traditional criminal culpability, and with a young defendant having a comparatively favorable prior history and no history of abusing the victim. Our extensive review of similar defendants and similar issues leads us to the conclusion that the presumption of a proportional punishment in this case has been overcome. The imposition of death for this particular defendant under these specific circumstances, as tragic as they are, would qualify as disproportionate. It is our view that the sentence should be modified, as in State v. Smalley, to life without the possibility of parole.

This holding appears to be in compliance with the ruling of our supreme court in State v. Hale, the only prior Tennessee case in which the death penalty has been held disproportionate by one of our state appellate courts. As previously noted, Hale involved a 19-year-old defendant, charged with the care of the two-year-old victim, who administered a series of disciplinary beatings over an extended period of time before "losing his cool," as he had on four or five prior occasions, and repeatedly striking the victim in the face, stomach, and back, causing deep tears in the liver and bowels which resulted in death. While the supreme court set aside the death penalty because the underlying offense was child abuse, a misdemeanor, our high court also declared that the penalty was disproportionate.

Accordingly, we modify the sentence for the defendant's first degree murder conviction to life without the possibility of parole.

(IV)

Prior to trial, the defendant sought a dismissal of the charge of aggravated child abuse. The defendant contended that because aggravated child abuse is a lesser included offense of felony murder in the perpetration of aggravated child abuse, a conviction for aggravated child abuse would be barred by Article I, § 10 of the Tennessee Constitution and the Fifth Amendment to the United States Constitution, both of which prohibit double jeopardy. In this appeal, he points out that Tenn. Code Ann. § 39-15-401(d) provides that a "violation of this section may be a lesser included offense of any kind of homicide, statutory assault, or sexual offense if the victim is a child and the evidence supports a charge under this section."

The defendant acknowledges that in State v. Blackburn, 694 S.W.2d 934 (Tenn. 1985), our supreme court held that punishments for both felony murder and the underlying felony offense are constitutionally permissible. In Blackburn, our high court ruled that "where multiple convictions for separate statutory offenses are imposed in a single trial, the key issue is whether the legislature intended cumulative punishment." Id. at 936. The court affirmed the defendant's convictions for both felony murder and assault with intent to commit rape, holding that "[n]othing in the statutory definitions of murder in the first degree and of the [underlying] felonies . . . indicates a legislative intent that conviction and punishment for both offenses should not be permitted." Id. at 937 (quoting State v. Briggs, 533 S.W.2d 290, 292-93 (Tenn. 1976)). The defendant argues that this case is distinguishable from the ruling in Blackburn because the statute explicitly provides that aggravated child abuse is a "lesser included offense of any kind of homicide." Tenn. Code Ann. § 39-15-401(d). He correctly asserts that aggravated child abuse is the only felony capable of supporting a felony murder conviction that is legislatively declared a lesser included offense.

In response, the state submits that particular facts in this case warranted separate convictions, asserting that when the defendant broke the victim's arm by jerking him from the crib, that act was separate and distinct from throwing the victim to the floor, causing the skull and spinal fractures. The state also asserts that the defendant's failure to provide timely treatment and leaving the victim alone in his room for over an hour was further indication of additional abuse. The state cites State v. Binion, 947 S.W.2d 867 (Tenn. Crim. App. 1996), wherein this court upheld separate convictions for attempted aggravated rape and aggravated sexual battery, arising out of one continuous act. Furthermore, the state argues that while Tenn. Code Ann. § 39-15-401 does establish that child abuse is a lesser included offense "of any kind of homicide," Tenn. Code Ann. § 39-15-402, which defines aggravated child abuse, does not.

Tennessee Code Annotated Section 39-15-401(d) does, in fact, provide that a "violation of this section may be a lesser included offense of any kind of homicide" This statutory subsection also provides that where "conduct violating this section also constitutes assault, the conduct may be prosecuted under this section or under § 39-13-101." Tenn. Code Ann. § 39-15-401(d). There are no corresponding provisions in Tenn. Code Ann. § 39-15-402.

It has been held that principles of double jeopardy do "no more than prevent . . . greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359 (1983). Double jeopardy does not mean that there can be no cumulative punishment; there are double jeopardy limitations upon convictions and punishments only when the intent of the legislature is unclear:

Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. at 368.

Clearly, there are separate statutes proscribing aggravated child abuse and murder in the perpetration of aggravated child abuse. Recently, however, in State v. Ducker, _____ S.W.3d _____ (Tenn. 2000), No. M1997-00074-SC-R11-CD, 2000 WL 968457 (July 14, 2000), our supreme court upheld two counts of aggravated child abuse after the defendant, who had left her two children (ages 12 and 23 months) in a locked car for approximately 9 hours, had been acquitted of felony murder. There were indictments for two counts of first degree murder but no separate charges for aggravated child abuse. In Ducker, which was decided under Tenn. Code Ann. § 39-13-202(a)(4) (1994) (repealed and replaced by the July 1, 1995, amendment which applies to this case), our supreme court observed that the underlying intent of the statute, which pronounced the reckless killing of a child by aggravated child abuse to be first degree murder, did not appear "to permit dual convictions and sentences for both felony murder and the predicate felony" Id., slip op. at 4. The aggravated child abuse convictions were deemed lesser included offenses. In a footnote, the supreme court acknowledged the ruling of this court in State v. Hodges, 7 S.W.3d 609 (Tenn. Crim. App. 1998), wherein dual convictions for first degree felony murder, under the 1995 amendment, and aggravated child abuse were upheld. Id. n.2. Our ruling in Hodges did not, however, address the specific issue of whether a felony murder conviction based on aggravated child abuse precludes a separate conviction for the underlying aggravated child abuse. The question was never presented.

Child abuse and neglect are proscribed by Tenn. Code Ann. § 39-15-401: "Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare commits a Class A misdemeanor; provided, that if the abused or neglected child is six (6) years of age or less, the penalty is a Class D felony." Tenn. Code Ann. § 39-15-401(a). Child abuse and neglect become aggravated upon a finding of either of the following elements:

- (1) The act of abuse results in serious bodily injury to the child;
or
- (2) A deadly weapon is used to accomplish the act of abuse.

Tenn. Code Ann. § 39-15-402(a)(1)–(a)(2).

In our view, the two statutes, consecutive sections within the chapter addressing "Offenses Against the Family," must be read in pari materia. The express language of Tenn. Code Ann. § 39-15-402 makes reference to the entirety of Tenn. Code Ann. § 39-15-401 for the full definition of child abuse and neglect. See Tenn. Code Ann. § 39-15-402(a). There is no limitation, as the state suggests, to Tenn. Code Ann. § 39-15-402's reliance on Tenn. Code Ann. § 39-15-401.

The law in existence at the time of this offense also specifically provided that child abuse or neglect "may be a lesser included offense of any kind of homicide" Tenn. Code Ann. § 39-15-401(d). The rationale expressed in Ducker must, therefore, apply. It must be presumed, as the defense and the state agree, that the legislature knew of this provision at the time of the 1995 amendment to the first degree murder statute. While there exists a well-established principle that the underlying felony warranting a felony murder conviction may be separately punished, there is simply no comparable statute directing treatment as a lesser included offense for any of the other felonies enumerated in Tenn. Code Ann. § 39-13-202. Neither are any of the other felonies lesser included offenses of a homicide.

In Blackburn, our supreme court ruled as follows:

"Nothing in the statutory definitions of murder in the first degree and of the felonies listed in T.C.A. § 39-2402(4) indicates a legislative intent that conviction and punishment for both offenses should not be permitted." The two statutes are directed to separate evils. See Albernaz v. United States, supra, 450 U.S. at 343, 101 S. Ct. at 1144, wherein the Court in determining congressional intent on the issue of cumulative punishments noted that the two statutes were directed to separate evils. It is our opinion, as it was at the time Briggs I [State v. Briggs, 533 S.W.2d 290 (Tenn. 1976)] was decided, that the legislature intended that multiple punishments be imposed on conviction of a defendant for felony murder and for the underlying felony.

694 S.W.2d at 937 (quoting Briggs, 533 S.W.2d at 292-93).

The evil addressed by the legislation at issue is the aggravated abuse or neglect of a child. The defendant must, under the statute, "knowingly" commit either of those crimes. The legislative history of the 1995 amendment to the first degree murder statute suggests that the objective was to increase the degree of the penalty, not to implement an additional penalty. In Ducker, our supreme court made the following observation:

Tennessee merger law . . . mandates that dual convictions of both a greater offense and its lesser included offense merge, thereby vacating

the conviction for the lesser- included offense. See State v. Beard, 818 S.W.2d 376, 379 (Tenn. Crim. App. 1991).

Ducker, slip op. at 4. The court noted "that a legislative intent to permit dual convictions in sentences for both felony murder and the predicate felony does not appear to be present under the reckless killing of a child provision in Tenn. Code Ann. § 39-13-202(a)(4) (1994)." Id. Our high court explained as follows:

The legislature originally codified the reckless killing of a child by aggravated child abuse in response to State v. Kerry Phillip Bowers, No. 115 (Tenn. Crim. App., filed Aug. 2, 1989). This codification was known as the "Scotty Trexler Law." The intent of the Scotty Trexler Law was not to permit dual convictions but to punish the reckless killing of a child as first degree murder. See State v. Hale, 840 S.W.2d 307, 310, n.3 (Tenn. 1992) ("The amendment was passed by the General Assembly late in the session in response to the public outcry after the conviction of Kerry Phillip Bowers for the lesser offense of the second-degree murder of Scotty Trexler . . .").

Id.

Aggravated child abuse or neglect is unique among the felonies capable of supporting a felony murder conviction because it may be, as indicated in Ducker, a lesser included offense of homicide. Because the legislature did not clearly intend a cumulative punishment for aggravated child abuse where there is a conviction and punishment for first degree felony murder arising out of the same aggravated child abuse, the defendant's conviction for the former must be set aside.

(V)

Next, the defendant contends that the evidence is insufficient to support the conviction. He claims that the state failed to show that the injuries to the victim were "knowingly" inflicted as required by Tenn. Code Ann. § 39-15-401. The defendant cites Tenn. Code Ann. § 39-11-302(b), which provides that a "person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." He reasons that because the 1995 amendment to the first degree murder statute provides that "no culpable mental state is required for conviction . . . except the intent to commit the enumerated offenses," the evidence is insufficient to establish that his conduct was "reasonably certain to cause the serious bodily injury to the victim." His argument is that a rational jury could not have found the existence of the culpable mental state beyond a reasonable doubt.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 834 (Tenn. 1978). This court may neither reweigh nor reevaluate the evidence. Id. at 836. Nor may this

court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978).

When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The evidence is sufficient when a rational trier of fact can conclude that the defendant is guilty. Jackson v. Virginia, 434 U.S. 307 (1979). There is no culpable mental state for the commission of a felony murder except for the intent to commit the underlying offense.

Tennessee Code Annotated Section 39-11-301(a)(2) provides that where "knowing" is the requisite intent, it may be established by proof of an intentional act. Tennessee Code Annotated Section 39-11-302(a) defines an intentional act as an act committed by a person acting "intentionally with respect to the nature of the conduct or to a result of the conduct when it was the person's conscious objective or desire to engage in the conduct or cause the result."

From the proof offered at trial, the jury may have reasonably inferred that the defendant, suddenly angry with the victim's incessant crying, handled the victim so roughly as to fracture his arm and then threw the victim across the bedroom or toward the floor in such a forceful manner as to cause fractures to the skull and injury to the spine. While the defendant claimed that his act was not designed to cause serious bodily injury, the jury, after considering the extensive nature of the physical damage to the victim, the failure of the defendant to seek immediate treatment for the victim, and the inconsistencies in the defendant's statements to police, chose to reject the claim of accidental death. Among the injuries shown were three bilateral, occipital skull fractures; a displaced, twist-type fracture to the right humerus; bilateral retinal hemorrhages; and a lacerated disc. Medical experts discounted the possibility of a two- or three-foot fall causing such extensive injuries. Examples given of forces which would have resulted in similar injuries included a fall from ten feet, a car wreck, being hit by a baseball bat, falling two stories to a concrete floor, and being shaken violently and thrown across a room. The jury concluded, as was its prerogative, that the defendant had been untruthful. According to one expert, none of the explanations for the victim's injuries provided by the defendant fit with "basic physics."

In State v. Crowe, 914 S.W.2d 933, 938 (Tenn. Crim. App. 1995), this court ruled that proof of intent to cause serious bodily injury is not necessary so long as the evidence proves that the conduct causing the injury was intentional. An intentional act is, of course, a knowing act. Throwing a child the age of the victim is unwarranted under any circumstances, given the inherent risk of serious bodily injury. In summary, the evidence was sufficient.

(VI)

The defendant contends that the trial court erred by failing to grant his motions to suppress his statements to police. In one motion, he alleged that his statements were involuntary. In the other, he alleged that the statements should be suppressed because police failed to electronically record the interrogation.

A

Because the defendant, in his appellate brief, does not argue that his confession was involuntary, this court will address only the issue of whether the interrogation should have been electronically recorded. It is our view that the Tennessee Constitution does not require recording of custodial interrogations. While police officers should perhaps record such interrogations when possible, that is a matter for legislative consideration rather than judicial mandate.

When first interviewed by police, the defendant denied knowing anything about the circumstances causing injury to the victim. Upon further questioning, the defendant admitted having been responsible for the injuries, but provided as many as nine different versions of what occurred. One of the officers present during the interrogation testified that, before relating "version eight," the defendant announced that he was "going to tell . . . the whole truth." He then acknowledged that he had attempted to throw the victim onto the bed, but missed and hit the floor. Both officers testified that this version was most closely aligned with the circumstances surrounding the crime. After a break in the interrogation, however, the defendant refused to sign a written statement based on "version eight." Instead, he revealed yet another version in which he maintained that he did not throw the victim, but had instead squeezed his head in an effort to stop him from crying. The defendant signed a written statement to that effect. None of the interrogation was recorded. The detectives acknowledged that they could have easily obtained a tape recording, but explained that "we don't normally, as a rule, record our interviews."

Our state law does not require police officers to electronically record their interrogations of suspects. The defendant argues, however, for a good faith change in the law. Our research indicates that the only Tennessee case to address this issue is State v. Nathan Allen Callahan, No. 03C01-9507-CC-00203 (Tenn. Crim. App., at Knoxville, Apr. 24, 1997). In Callahan, this court made the following observations:

Although we agree that it is preferable to record electronically the reading of Miranda warnings, the waiver of rights, and custodial interrogations, we decline to impose this as a requirement for admissibility of statements. It inures to the benefit of law enforcement to record the processes by which it garners confessions by showing that the procedures were done properly and without coercion. It is rather curious that the detectives in this case chose to

write out the Defendant's statement in longhand. Yet, neither the federal nor state constitutions mandate the use of recording devices.⁷

Id., slip op. at 20.

Our supreme court was presented with the issue of recording interrogations in State v. Odom, 928 S.W.2d 18, 23-24 (Tenn. 1996). Because the issue was not dispositive, however, the court declined to address it, simply stating, "[W]e believe that the issue is one more properly directed to the General Assembly." Id. at 24.

Only two states, Alaska and Minnesota, require the recording of custodial interrogation as a prerequisite to their admissibility.⁸ The Alaska Supreme Court established the rule when it held that the due process clause of the Alaska Constitution requires recording of an interrogation "when the interrogation occurs in a place of detention and recording is feasible." Stephan v. State 711 P.2d 1156, 1159 (Alaska 1985). In Stephan, the court concluded that a recorded interrogation "protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession." Id. at 1161. The court expressed the view that less time would ultimately be spent in court resolving disputes over what occurred during a defendant's interrogation. Id. at 1162. The court observed as follows:

[A] recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

Id. at 1161. The Minnesota Supreme Court reached a similar decision, based not upon the state constitution, but upon the court's own supervisory powers. See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

Alaska and Minnesota, however, form a distinct minority, as at least 23 other states have addressed this issue and declined to require electronic recording. See Stoker v. State, 692 N.E.2d 1386, 1388 (Ind. Ct. App. 1998). In Stoker, the Indiana Court of Appeals analyzed United States Supreme Court decisions regarding the preservation of exculpatory evidence and found that federal

⁷Callahan was appealed to the supreme court, which has since issued an opinion. See State v. Callahan, 979 S.W. 2d 577 (Tenn. 1998). The appeal, however, did not address the issue of recording devices.

⁸Texas has a limited recording requirement; confessions, but not custodial interrogations, must be recorded to be admissible. See Tex. Code Crim. P. Ann. art. 38.22, § 3(a)(1).

due process does not require the taping of custodial interrogations. In California v. Trombetta, 467 U.S. 479, 489 (1984), the Supreme Court ruled that police must preserve evidence that "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Later, in Arizona v. Youngblood, 488 U.S. 51, 58 (1988), the Court found that failure to preserve evidence that might be useful to a defendant is not a denial of due process unless the defendant can show that the police acted in bad faith. After consideration of Trombetta and Youngblood, the Indiana Court of Appeals in Stoker concluded that Indiana's standard for preservation of evidence was consistent with federal law. Stoker, 692 N.E.2d at 1390.

The federal constitution does not mandate the recording of custodial interrogations. Neither does our state constitution. Whether to impose such a recording requirement is a decision best left for the General Assembly.

B

The defendant also argues that, because the death penalty is involved, a motion to suppress should be considered "in light of a heightened standard of due process, as required by the Eighth and Fourteenth Amendments to the United States Constitution." The defendant points to the "finality and severity" of the death penalty and the Supreme Court's admonition that "there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The police, the defendant contends, have made the content of the interrogation less reliable by choosing not to record the interrogation when they could have easily done so. He maintains that this situation is analogous to that in State v. Livesay, 941 S.W.2d 63 (Tenn. Crim. App. 1996), where this court found that police interfered with the defendant's statutory and due process rights by refusing to allow him to obtain an independent blood analysis in a drunk driving prosecution. Our court ruled that this was "tantamount to suppression of evidence favorable or useful to the defense." Id. at 65. Here, the defendant contends that by failing to record the interrogation, the police similarly deprived him of his only opportunity to preserve important evidence.

Livesay is, of course, distinguishable. First, the right of motorists charged with drunk driving to an independent sobriety test has been widely held to be required by due process. Id. at 65. Additionally, it is also authorized by statute in this state. Tenn. Code Ann. § 55-10-410(e). In contrast, the recording of custodial interrogations is neither mandated by due process nor directed by statute.

More importantly, the defendant has offered no proof that the availability of a recording of his interrogation would have benefitted him in his defense. The defendant challenged only a single statement made by one of the officers present during his interrogation; that is, that he had thrown the victim approximately 10 feet. This testimony was excluded by the trial court and there is no suggestion that its exclusion was in any way prejudicial to the defense. In fact, the exclusion probably served to benefit the defendant.

In summary, the trial court did not err by failing to grant the defendant's motions to suppress his statements to police.

(VII)

The defendant asserts that the trial court erred by allowing the admission of (1) a medical opinion that the victim's injuries were the result of "non-accidental trauma of child abuse," and (2) the victim's death certificate, which declared the cause of death to be "child abuse." While acknowledging that Rule 704 of the Tennessee Rules of Evidence provides that opinion testimony may address the ultimate issue, the defendant asserts that the contested evidence did not "substantially assist the trier of fact to understand the evidence or to determine a fact in issue" Tenn. R. Evid. 702. The defendant maintains that the expert testimony confused the jury because the term "child abuse" was used in a medical sense rather than a legal sense. The defendant also claims that the term should have been excluded pursuant to Rule 403 of the Tennessee Rules of Evidence because the danger of unfair prejudice outweighed its probative value.

When questioned by the state, Dr. Mohon, the state's medical expert, used the term "child abuse" in his diagnosis. When further questioned, he explained that the term had a medical meaning equivalent to non-accidental trauma. The trial court then provided an instruction which emphasized the difference between "child abuse" as a medical term and "child abuse" as a legal term. In our view, that instruction served to clarify the testimony. No error occurred.

Furthermore, it is our view that the admission of the death certificate was not improper. The death certificate was simply evidence of the victim's death. The instructions provided by the trial court made a distinction between the medical definition and the legal definition of the term child abuse. That was sufficient.

(VIII)

Next, the defendant claims that the trial court erred by providing a faulty instruction and by failing to issue a proper grand jury makeup. More specifically, he complains that the trial court should have excluded Tennessee Pattern Jury Instruction-Criminal No. 7.04(c) and should have deleted "important" language from the instruction. He asserts that the trial court, failing to do so, erred by denying an offer of proof on the subject of whether to edit the instruction. Finally, he argues that the exclusion of certain disabled persons from the grand jury denied him a representative cross-section of the community.

Initially, the defendant alleges that T.P.I.-Crim. 7.04(c), which addresses sentencing for first degree murder, is "so poorly written that the average juror would have difficulty in understanding and applying the law in the penalty phase of the trial." In a hearing on the defendant's pre-trial motion to strike the instruction, Dr. Michael Blankenship, Associate Professor and Chair of the Department of Criminal Justice and Criminology at East Tennessee State University, testified that a study conducted by him with potential Shelby County jurors revealed that the jurors'

comprehension was low when instructions were vague, but was higher when the instructions were more specific. As an example of a confusing instruction, he cited the instruction on aggravating circumstances prescribed by our statute. The defendant's primary complaint was that the pattern instruction did not define the burden of proof with regard to mitigating circumstances. The trial court initially ruled that the defendant's motion was premature because evidence had not yet been presented. Subsequently, the defendant filed a sealed ex parte motion requesting funding for the services of Dr. Blankenship to conduct a study of the jurors selected to participate. The trial court deferred ruling upon the request until the completion of the trial.

After all of the evidence was presented at the trial, the defendant again asked the trial court to delete T.P.I.-Crim. 7.04(c). The motion was denied. After the trial, the defendant filed an ex parte motion seeking funds for Dr. Blankenship to test the comprehension of actual jurors in this case. By sealed order, the trial court authorized funds to secure the services of Dr. Blankenship. At a later hearing on the defendant's motion to amend his motion for a new trial and a motion requesting a continuance on the hearing, the defendant offered the testimony of Dr. Blankenship. Rather than the issue he had been retained to address, his testimony related to alleged outside influences that he claimed he had discovered while interviewing the jurors.

The hearing on the motion for a new trial was reset for a later date, but Dr. Blankenship was not available at that time. The defendant asked for a second continuance due to his unavailability, but was denied. The defendant also requested permission to submit an offer of proof in the form of an affidavit from Dr. Blankenship, but the trial court denied the request, ruling that evidence of jury deliberations was inadmissible unless it fell within Rule 606(b) of the Tennessee Rules of Evidence. Rule 606(b) permits such evidence only where extraneous prejudicial information was improperly brought to the jury's attention, where any outside influence was improperly brought to bear upon any juror, or where the jurors agreed in advance to be bound by a quotient or gambling verdict without discussion. In ruling on the motion, the trial court considered the earlier testimony by Dr. Blankenship and the written articles that he had provided.

In this appeal, the defendant claims that the trial court erred in preventing him from presenting evidence that the jury was unable to comprehend the trial court's instruction. In State v. Alley, 882 S.W.2d 810 (Tenn. Crim. App. 1994), this court ruled that it is error to disallow an offer of proof when the excluded evidence is not obviously incompetent or irrelevant. The state maintains that the purpose for which the defendant sought to make an offer of proof qualifies as both incompetent and irrelevant. The state submitted affidavits from the four jurors interviewed by Dr. Blankenship. Each juror expressed concern over possible misrepresentations made by Dr. Blankenship. All swore that they had understood the trial judge's instructions and that, by comparison, the questions posed by Dr. Blankenship were far more difficult to understand.

The jurors indicated that they had responded to a letter asking for their participation in a "national survey" of juror experiences in capital cases. All answers, they were informed, were to remain confidential. Because the premise of the inquiry by Dr. Blankenship was, in fact, misleading, because the jurors understood the instructions, and because the trial court provided a clear, concise

charge on the subject, it is our view that there was no error by the trial court in either refusing the offer of proof or otherwise denying a continuance. The opinions offered were simply not relevant. Moreover, the very material which Dr. Blankenship might have offered actually appears in the record. That would militate against the grant of relief.

Next, the defendant claims that the trial court erred by deleting certain language from T.P.I.-Crim. 7.04(c). The pattern instruction provides in pertinent part as follows:

The defendant does not have the burden of proving a mitigating circumstance. If there is some evidence that a mitigating circumstance exists, then the burden of proof is upon the state to prove, beyond a reasonable doubt, that the mitigating circumstance does not exist.

At the conclusion of the trial, however, the trial court substituted the following instruction:

The defendant does not have the burden of proving a mitigating circumstance. If there is some evidence that a mitigating circumstance exists, then the burden of proof is upon the state to prove, beyond a reasonable doubt, that the aggravating circumstance outweighs any mitigating circumstance or circumstances.

The defendant complains that the trial court erred by failing to give the instruction as written, that is, by omitting the placement of the burden upon the state to prove beyond a reasonable doubt that a mitigating circumstance does not exist.

In State v. Hodges, the defendant asserted that the trial court committed error by failing to instruct the jury that the state had the burden to disprove any mitigating circumstances beyond a reasonable doubt. Our supreme court ruled that requiring the state to disprove any mitigating circumstances beyond a reasonable doubt does not conform to applicable law. 944 S.W.2d at 354-55. The high court observed as follows:

There is no provision in the capital sentencing scheme to support the defendant's claim that the State must disprove mitigating circumstances beyond a reasonable doubt. Indeed, it is difficult to imagine how the State could meet such a burden. Jurors individually consider mitigating circumstances and need not unanimously agree to any certain one. Accepting the defendant's argument would impose upon the State the untenable task of disproving the existence of each mitigating circumstance to twelve different individuals. This duty has not been imposed by statute and we refuse to judicially impose it.

Id. at 354.

In our view, the instructions provided by the trial court were proper. The trial judge permitted the jury to consider every possible mitigating circumstance.

Finally, the defendant claims that he was deprived of a jury selected from a fair cross-section of the community. Specifically, he claims that Tenn. Code Ann. § 22-1-102, which exempts certain persons from jury service, violates the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and that due to this violation, he was indicted by a grand jury that was not composed of a fair cross-section of the population of Sullivan County. Tennessee Code Annotated § 22-2-302 establishes the selection requirements. There is no evidence in the record that the jury selection in this case excluded any cognizable group.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the United States Supreme Court made it clear that the states are free to prescribe qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community. Here, the defendant has simply failed to prove that the jury selection system in Sullivan County systematically excluded distinctive groups so that it was not reasonably representative of a fair cross-section of the county's population. See Duren v. Missouri, 439 U.S. 357 (1979).

(IX)

The defendant claims that the state's use of a chart during closing argument, which summarized each of the nine statements the defendant made in response to questioning by police, was an improper comment on his failure to testify. The defendant complains that the word "uncontradicted" was written over the chart.

The defendant claims that any assertion that the evidence was "uncontradicted" was improper. In State v. Donald Wesley Dodson, No. 161, slip op. at 5 (Tenn. Crim. App., at Knoxville, Feb. 8, 1989), perm. app. denied (Tenn. May 8, 1989), the assistant district attorney remarked that there had been no rebuttal and nothing to contradict the state's proof. This court described the assistant district attorney's statement as "a poorly disguised comment on the defendant's right to remain silent." Id. Even though the error was compounded by a reference to the grand jury indictment, however, the strength of the evidence precluded a reversal of the conviction.

Here, defense counsel failed to contemporaneously object to the use of the chart or to the prosecuting attorney's reference to the chart. Ordinarily, that would result in a waiver of the issue on appeal. See State v. Pritchett, 621 S.W.2d 127, 135 (Tenn. 1981).

The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a defendant's right to remain silent. In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that a prosecutor cannot comment during final argument upon the accused's failure to take the stand in his own defense. This state has adhered to that rule. See Staples v. State, 89 Tenn. 231, 14 S.W. 603 (1890). Yet it has also been held that "[m]ere argument by the State that proof on a certain point is unrefuted or uncontradicted

is not an improper comment upon a defendant's failure to testify." State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App. 1985). While conceding that there is often some difficulty in distinguishing the exception from the rule, it is our opinion that this final argument was directed toward the credibility of the defendant, who had in fact, through his various statements, communicated indirectly with the jury. The argument was not, in our assessment, a comment upon the defendant's exercise of his right not to testify at the trial.

(X)

The defendant filed numerous motions to dismiss alleging that the death penalty is unconstitutional on the grounds that the statute fails to meaningfully narrow the class of death eligible defendants, that death is imposed capriciously and arbitrarily, that electrocution is a cruel and unusual punishment, and that appellate review of death penalty cases is constitutionally inadequate. The defendant, however, concedes that these issues have been previously resolved by the appellate courts contrary to his claims. See State v. Cazes, 875 S.W.2d 253 (Tenn. 1994).

The defendant also contends that the trial court erred by not granting his motion for an arrest of judgment because the presentment failed to allege the commission of a criminal offense. He claims that each of the two counts of the presentment provided insufficient notice.

The presentment at issue in this case charged the following:

Count One: The Grand Jurors for Sullivan County, Tennessee, duly empaneled and sworn, upon their oath present that BOBBY GENE GODSEY on or about January 1, 1996 in the State and County aforesaid and before the finding of this Presentment did unlawfully and feloniously kill one Evan Price, a child 7 months of age, in the perpetration of or attempt to perpetrate the felony offense of aggravated child abuse, contrary to T.C.A. Section 39-13-202 and

Count Two: The Grand Jurors for Sullivan County, Tennessee, duly empaneled and sworn, upon their oath present that BOBBY GENE GODSEY on or about January 1, 1996 in the State and County aforesaid and before the finding of this Presentment did unlawfully, feloniously and knowingly treat Evan Price, a child 7 months of age, in such a manner as to inflict injury and the act of abuse resulted in serious bodily injury to the child, contrary to T.C.A. Section 39-15-402 and

An indictment must accomplish the following three purposes:

- (1) provide notice to the defendant of the precise charges against which he or she must defend;
- (2) notify the trial court of the charges against the defendant so the trial court can enter an appropriate judgment and sentence; and
- (3) protect the defendant against double jeopardy.

State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996); State v. Haynes, 720 S.W.2d 76, 82 (Tenn. Crim. App. 1986).

Here, each of the presentments made reference to the appropriate statute. The grand jury stated the crimes for which the defendant was charged, named the victim, included the victim's age, and listed the date of the offense. The content included an allegation of the culpable mental state. In our view, this is sufficient notice of the precise charges. See State v. Davis, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987). If the defendant desired more specific information, he could have asked the trial court to order a bill of particulars. See Tenn. R. Crim. P. 7(c); State v. Hicks, 666 S.W.2d 54, 56 (Tenn. 1984). Moreover, the presentment specified both the offense of first degree felony murder and that of aggravated child abuse. In our view, the presentment provided sufficient detail so as to prevent duplicate prosecutions. In summary, the presentment was adequate to support the convictions.

Conclusion

The felony murder conviction is affirmed, but the sentence is modified to life without the possibility of parole. Because the legislature did not intend for a separate conviction and sentence for aggravated child abuse, that conviction is reversed and dismissed.

An editorial comment may be appropriate. This has been a particularly difficult opinion which has taken an inordinate amount of time to complete, primarily due to the desire of the author to conduct a thorough research on issues of law which qualify as either novel or in unfinished stages of development. Our decision is not designed as an expression of sentiment for the defendant. Instead, our hearts grieve for the life of Evan Pierce, who will never know the joys of childhood, who will never experience the struggles of adolescence, and who, through no fault of his own, has forever lost the opportunity for a long and fruitful existence upon this earth. It is our duty through our training and experience to impose, as best we are able, a sentence which fits within the range of punishment meted out to similar defendants convicted of similar crimes. Our objective analysis of these particular facts and circumstances has led us to the conclusion that the sentence must be life without parole, a punishment that permanently removes the defendant from society, but does not impose equal retribution.

GARY R. WADE, PRESIDING JUDGE